

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 622 of 1994

with

CRIMINAL APPEAL No 690 of 1994

and

CRIMINAL APPEAL No 719 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JAYANTIBHAI DAHYABHAI SOLANKI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 622 of 1994
MR AD DESAI for Petitioner
MR SP DAVE, A.P.P. for Respondent No. 1
2. Criminal Appeal No 690 of 1994
MR G RAMAKRISHNAN for Petitioner
MR SP DAVE, A.P.P. for Respondent No. 1
3. Criminal Appeal No 719 of 1994
MR NK PATEL for Petitioner

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 17/04/98

ORAL JUDGEMENT

The three appellants namely Jayantibhai Dahyabhai Solanki, Ghanshyambhai Dahyabhai Patel and Khemabhai Savjibhai Dhusa were respectively accused No.1, accused No.5 and accused No.7 in Atrocity Case No.51/93. They along with the accused No.4 Kantaben Ghanshyambhai Patel were convicted of the offences punishable under section 376, 363, 366 read with section 114 of the Indian Penal Code (IPC for short) and under section 3 (11) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and they were sentenced as per the particulars set out hereinbelow by the learned Additional Sessions Judge, District Sabarkantha at Camp Modasa as per the judgment and order dated 25th April, 1994.

Particulars:

Accused No.1 :

Jayantibhai Dahyabhai Solanki: rigorous imprisonment for seven years and fine of Rs.250/- in default simple imprisonment for 30 days for the offence punishable under section 376 of the IPC.

Accused No.4, 5 and 7 :

Kantaben Ghanshyambhai Patel, Ghanshyambhai Dahyabhai Patel and Khemabhai Savjibhai Dhusa: rigorous imprisonment for three years and fine of Rs.200/- each in default, simple imprisonment for 15 days for the offence punishable under section 363 read with section 114 of the IPC.

Same accused persons: rigorous imprisonment for seven years and fine of Rs.250/- each, in default, simple imprisonment for 30 days for the offence punishable under section 366 read with section 114 of the IPC.

Same accused persons: rigorous imprisonment for seven years and fine of Rs.250/- each, in default, simple imprisonment for 30 days for the offence punishable under section 376 read with section 114 of the IPC.

Accused No.1, 4 and 5:

Simple Imprisonment for a period of twelve months and fine of Rs.250/-, in default, simple imprisonment for 30 days for the offence punishable under section 3 (11) of the Schedules Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Rest of the accused persons namely, accused No.2, 3 and 6 came to be acquitted of the offences with which they were charged along with the aforesaid accused persons.

Facts of the prosecution case may briefly be stated.

Complainant-prosecutrix Gangaben daughter of Kababhai Thavrabhai Gameti used to reside with her parents, sisters and her brother at village Rajgaur, Taluka Meghraj. Ilaben happens to be her elder sister. She was below 16 years of age when the incident had taken place. She was then unmarried. On account of weak financial condition of the family she was attending to labour work. In the month of Ashadh of the year 1993, accused No.7 Khemabhai Savjibhai Dhusa had been to her home and informed her father that labourers were to be taken on some work at Modasa and ten labourers were ready and he might send her daughter Ganga also. The complainant's father consented for sending his daughter Ganga for such work. On the next day, i.e. on the full moon day of the month of Ashadh of 1993, said Khemabhai Savjibhai Dhusa, one person described as contractor and his wife named as Kanta, had been to the complainant's house. The contractor was accused Ghanshyambhai. As per the earlier talk they had taken Ganga by saying that they were proceeding to Modasa. When they reached Modasa, the complainant was informed that the work was in progress at some other place and therefore they were proceeding to that place. Saying so, the complainant was taken in a bus to village Salod where she was taken at the house of accused Ghanshyambhai. Accused Khemabhai Savjibhai Dhusa who was belonging to the village to which the complainant belonged, left the place without informing her. She was thus compelled to stay at the house of Ghanshyambhai for a period of five days when accused Ghanshyambhai had committed rape during night time with her. Thereafter, accused Ghanshyambhai and his wife Kantaben informed her that they were taking her to her parents' house but in fact they had taken her to village Rajaji-na-muwada situated in Kapadwanj Taluka. She was there taken at some temple and was got married with one Jayantibhai Dahyabhai by the ceremony of offering flower garlands.

Thereafter accused Ghanshyambhai and his wife Kantaben had left the place on the next day. Since then accused No.1 Jayantibhai Dahyabhai indulged in illicit sexual relationship with the complainant Ganga. Some time thereafter her father, one Ramabhai Kalabhai Bhagora, one Arjunsingh Udesinh Rathod, one Pancha Dhuljibhai and other persons arrived at the house of accused Jayantibhai Dahyabhai. They tried to persuade the accused Jayantibhai and ultimately by making a suggestion that they would take complainant-Ganga for the occasion of Ana and after that occasion they would send back complainant-Ganga. On such persuasion they could bring home complainant Ganga.

Complainant-Ganga studied upto III standard and she was always in search of occasion for escaping but on account of threatening and on account of fear she could not escape. Accused Jayantibhai used to address her that he had purchased her for the consideration of Rs.8500/(Rs.5000/in the first instance and Rs.3500/- in the second instance) and he had paid such money to accused Ghanshyambhai.

Complainant Gangaben narrated the above facts in her complaint dated 27th August, 1993 registered as I C.R. No. 51/93 in Meghraj Police Station. After the investigation was completed and chargesheet was filed, all the aforesaid accused persons came to be charged with the offences as aforesaid before the learned Additional Sessions Judge. They were accordingly tried and heard. After there statements were recorded under section 313 of the Code of Criminal Procedure, 1973, (2 of 1974) and after the arguments were heard from both the sides the learned Additional Sessions Judge rendered aforesaid judgement of conviction and sentence which has been subjected to challenge before this Court.

The learned counsels appearing for respective appellants herein have read before this Court the evidence adduced before the learned Additional Sessions Judge. Their main arguments have been that the complaint was belatedly given, that there were no marks of injury on the person of complainant-Ganga, that there was no resistance or attempt to escape on the part of the complainant Ganga, as appearing from the prosecution evidence and that the complainant's father having brought her back from the house of accused Jayantibhai for the occasion of Ana, the evidence flowing from the prosecution story could hardly have been said to be established beyond reasonable doubt.

Mr. S.P. Dave learned A.P.P. for State supported the impugned judgment and order by pointing out salient features of the prosecution evidence.

It appears that the prosecution has examined following witnesses before the learned Additional Sessions Judge.

PW-1, Complainant Gangaben Kababhai, Ex.37
PW-2, her father, Kababhai Thavrabhai Gameti, Ex.39
PW-3, Her mother, Miraben Kababhai, Ex.40
PW-4, Dhulji Manaji Menat, Ex.41
PW-5, Laljibhai Somabhai Gameti, (teacher) Ex.42
PW-6, Dr. Bipinkumar Karsandas Solanki, Ex.46
PW-7, Vaghjibhai Bhaiyajibhai Parmar, Panch witness, Ex.51
PW-8, Sukhabhai Shanabhai, Panch witness Ex.53
PW-9, Pashabhai Motibhai, panch witness, Ex.54
PW-10, Investigating Officer, Nathusinh Pujesinh Rathod, Ex.57

Prosecution has also placed on record following documents.

- (i) certificate with regard to admission of complainant-Ganga into the school, Ex.43.
- (ii) abstract from the school register, Ex.44
- (iii) birth certificate issued from the said school i.e. Rajgaur Primary School, Ex.45.
- (iv) police yadi for medical examination of complainant Ex.47
- (v) medical certificate with regard to the examination of the complainant Ex.48
- (vi) X-rays Ex.49 and 50.
- (vii) panchnamas, Ex.52, 55 and 58
- (viii) copy of the police yadi Ex.59
- (ix) medical certificate with regard to the accused No.1, Ex.60
- (x) medical certificate with regard to the accused No.2, Ex.61
- (xi) panchnama with regard to the accused No.1, Ex.62

(xii) notes of muddamal sent to Forensic Science Laboratory (FSL for short) Ex.63.

(xiii) FSL report Ex.64

(xiv) communication from FSL Ex.65.

The defence examined witness Ramabhai Kalabhai Bhagora at Ex.67.

It clearly appears from the prosecution evidence which has been read before this Court that the accused No.4, 5 and 7 had taken complainant Ganga on a false pretext that she was to be taken for labour work at Modasa. The prosecution story revolving around the communications with regard to the complainant being taken for labour work has clearly been stated by the complainant as well as her parents. It might be noted the complainant has studied upto III standard and her parents are not literate. They had no axe to grind against the concerned accused persons. In fact they appear to be clearly incapable of setting out false story with regard to how complainant-Ganga was taken by the aforesaid accused persons. It also appears in the evidence of the complainant that instead of she having been taken for labour work at Modasa, she was taken to the house of accused No.4 and 5 at village Salod. She has also stated about how she was deceived and how she was confined and raped by accused Ghanshyambhai Patel with the connivance of accused Kanta at their house. Once again she was deceived and taken to village Rajaji-na-muwada where she was sold to accused No.1 Jayantibhai Dahyabhai who committed rape on the complainant-Ganga. The story so stated by the prosecutrix can hardly be doubted. She belongs to a tribal community. After passage of number of days she could get relieved from the house of accused No.1 when her father and other persons had gone to take her from that place. Even they could take her back by making a show of taking her back for the occasion of Ana. The facts concerning this last mentioned incident get support from the evidence of other witnesses also. It can thus be seen that the complainant had remained out of her parental house for a number of days and she could only narrate her misfortune to her father when her father had gone to take her. Soon thereafter i.e. within a day or two the complaint has been filed. Under such circumstances it can hardly be said that the complaint has been so belatedly filed as to adversely affect the prosecution case. The learned Additional Sessions Judge

has dealt with the submissions with regard to delay in filing of the complaint at great length while discussing the prosecution evidence. For the reasons set out by the learned Additional Sessions Judge and for the aforesaid reasons the submissions with regard to belated filing of the complaint would hardly merit acceptance.

In my opinion, there is no substance in the submissions that there was no resistance or attempt to escape on the part of the complainant-Ganga and therefore either her consent should be presumed or the prosecution story as noted above can be said to have not been established beyond reasonable doubt. It might be noted from the prosecution evidence that the prosecutrix was constantly under the control of accused No.4, 5 and 7 in the first instance, then under the control of accused No.4 and 5 and in the third phase of prosecutrix's confinement, under the control of accused No.1, Jayantibhai. The complainant has come out with a case that she was being beaten and she was constantly under the threatening. She has deposed to about how she was under fear from the concerned accused persons at the relevant points of time. She was hardly 15 years of age. It would be too much to assume that since she could not escape there was either consent from her side or passive submission to the illicit acts she faced. Even in respect of such submissions canvassed before the learned Additional Sessions Judge, the learned Additional Sessions Judge has given cogent reasons for not accepting the same.

Same would be the position with regard to the last submissions about the father and other persons having brought complainant back home on the pretext of bringing her back for the occasion of Ana. It appears from the evidence of complainant's parents as well as other witnesses that there was apprehension from the side of accused no.1 Jayantibhai and other villagers from the side of Jayantibhai for not allowing the complainant being sent back home with her father. It was therefore quite natural for them to present some pretext so as to persuade or prevail upon the accused Jayantibhai to allow the complainant being taken by her father. Here also, the learned Additional Sessions Judge has given cogent reasons from the prosecution evidence itself. He has rightly rejected the evidence of defence witness Ramabhai Kalabhai Bhagora which will hereinafter be dealt with.

There has been some debate with regard to the age of the complainant. It has been submitted that the ossification test which has been performed by the medical

witness would reveal that the complainant must be aged between 16-1/2 to 17 years. Even then the offence under section 363 and 366 would be made out from the facts of the prosecution case which came to be established beyond reasonable doubt. However, the matter did not rest with the ossification test and more accurate evidence in that respect has been placed on record. The prosecution examined Laljibhai Somabhai Gameti who happened to be the teacher in Rajgaur Primary School where the complainant was admitted for study. The documentary evidence which has been noted above clearly establishes the age of the prosecutrix to be below 15 years at the time of the incident namely 3rd July, 1993 and onwards. I have examined the relevant extracts and certificates from the school produced by the aforesaid witness. I have no manner of doubt that the birth date of the complainant which was recorded in the school record was 1st June, 1979. Thus she was aged 14 years and nearly one month when the incident had taken place. It has been submitted before this Court that the complainant's father testified that he had taken the extract from the panchayat record when he had gone for admission of complainant-Ganga into the school whereas the investigation has not placed on record any such evidence. However, simply because panchayat record has not been produced before this court, the evidentiary value of the school record is not lost. It could not be submitted that the school records have been subsequently created. In fact the learned Additional Sessions Judge has carefully examined the documentary evidence in the form of the school records as also the evidence of the aforesaid teacher-witness. The positive evidence with regard to the age of the prosecutrix was placed on record and in absence of anything contrary to this evidence there was no reason why the same could not be accepted. In fact such evidence has been accepted by the learned Additional Sessions Judge while also relying upon the ossification test. The age which has been revealed from the ossification test is 16-1/2 years to 17 years and the medical witness has in terms deposed that the prosecutrix could in no case be aged more than 17 years but she could be aged less than 16 -1/2 years. That would clearly lend support to the evidence of the school records which have been discussed at length by the learned Additional Sessions Judge. Defence witness Ramabhai Kalabhai Bhagora clearly appears to have been examined by the defence for presenting false facts with regard to the age of the prosecutrix. It is not understandable how this witness could depose about the age of the prosecutrix when he did not know the age of the children of his own brother. In my opinion, the reasons given by the learned

Additional Sessions Judge for discarding the evidence of this defence witness are quite sound and deserve to be accepted.

Since the learned Additional Sessions Judge has for valid reasons accepted the prosecution case and since on a true and correct appreciation of the evidence he has come to conclusion that the prosecution has established the charges against the aforesaid accused persons, there is no reason for interfering with the impugned judgment and order of conviction and sentence in so far as the present appellants are concerned.

In the result, these appeals would fail and the same are accordingly dismissed.

zgs/-